Supreme Court, U.S.
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No. 05-1443

IN THE

Supreme Court of the United States

MOTION SYSTEMS CORPORATION,

Petitioner,

v.

GEORGE W. BUSH, President of the United States,
ROBERT B. ZOELLICK, United States Trade Representative,
and CCL INDUSTRIAL MOTOR, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I.

A CLEAR SPLIT EXISTS BETWEEN THE FEDERAL CIRCUIT AND DISTRICT OF COLUMBIA CIRCUIT AS A RESULT OF *DALTON v. SPECTER*

A clear split exists between the D.C. and Federal Circuits concerning the scope of *Dalton v. Specter*, 511 U.S. 462 (1994), and respondents' trifling factual distinctions do not change that. Here, the President, pursuant to authority delegated by Congress under a statute which imposed limits on the grounds for his decision and required that it be made on a factual record, made an economic decision, not a foreign policy or national security decision.

First, the respondents cite no authority for the proposition that such a decision, which they concede would be reviewable if made by a subordinate Executive Branch official pursuant to similarly delegated authority, transforms itself into an unreviewable decision if the President makes it. Their attempt thus to distinguish *Chamber of Commerce v. Reich,* 74 F.3d 1322 (D.C. Cir. 1996), fails. (*See* Opp. 9.) Indeed, neither the Federal Circuit nor the D.C. Circuit has held that all Presidential decision making is inherently insulated from review as a result of the President's "special status" within the Executive Branch. Rather, the Federal Circuit, in the present case, recognized that Section 421 set limits on the President, but declined to review his denial of import relief on the ground that "judicial review is unavailable when a statute allegedly violated itself commits a decision to the discretion of the President" because the decision to deny import relief on domestic economic grounds was "sufficiently discretionary to preclude judicial review." *Motion Systems v. Bush*, 437 F.3d 1356, 1362 (Fed. Cir. 2006).

In sharp contrast, the D.C. Circuit in *Chamber of Commerce* held that *Dalton* operates much more narrowly,

finding that judicial review of the President's exercise of delegated authority is precluded only where the authorizing statute "*contains no limitations* on the President's exercise of that authority. . . ." *Chamber of Commerce*, 74 F.3d at 1331 (emphasis added). Under *Chamber of Commerce*, the Presidential Section 421 decision here would be reviewed much the same as that of an Administrative Law Judge who made a decision on economic facts.

The D.C. Circuit's decision in *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), further highlights the conflict between the Federal and D.C. Circuits. In *Mountain States*, the D.C. Circuit reiterated that *Dalton* is inapposite "where the authorizing statute . . . places discernible limits on the President's discretion." *Id.* at 1136. This ruling unquestionably conflicts with the opinion below, which foreclosed all judicial review of petitioner's claims despite the explicit limitations on the President's ability to deny relief contained in Section 421(k)(2).

Contrary to respondents' assertion, *Mountain States* did not reserve "decision on the precise issue presented here" (Opp. 10) merely because the plaintiff in that case failed to allege facts sufficient to support its *ultra vires* claim. Significantly, the D.C. Circuit in *Mountain States* again recognized that Presidential decision making is subject to judicial review for compliance with statutory standards, but in that particular factual context stopped short of additional review of the lower court's fact finding after analyzing the plaintiff's claims and reviewing the challenged Presidential Proclamations. *Id.* at 1137. Further, unlike the plaintiff in *Mountain States*, petitioner here directed the attention of both the Court of Appeals and the trial court to the existence in the record of substantial evidence showing that the President's determination failed to comply with the fact

finding requirements of Section 421(k)(2). Accordingly, petitioner's claims are supported by more than "the bald assertion that the President acted outside the bounds of his constitutional and statutory authority." *Id.*

The split between the Federal Circuit and D.C. Circuit stems from divergent holdings about the *level* of discretion, if any, in delegated authority that will insulate Presidential action from judicial review. The conflict between the Circuits does not stem from the proposition that the *source* of the challenged executive action alters the outcome. Moreover, because respondents now contend that the fact that the President makes the decision renders that decision unreviewable, the need to grant a writ of certiorari is underscored. The proposition that the President, who can act only pursuant to authority that the Constitution either grants to him or which he receives from Congress and exercises in conformity with its delegation, cannot be reviewed when he acts pursuant to delegation, comprises a fundamental change in federal constitutional and administrative law.

Respondents next attempt to distinguish *Chamber of Commerce* and *Mountain States* on the ground that whereas those cases "involved only domestic issues, the President's exercise of his authority under Section 421 [supposedly] implicates the Nation's foreign relations." (*See* Opp. 10.) This feigned distinction lacks merit because the Presidential determination here under Section 421(k)(2) was based solely on domestic economic considerations. *See Presidential Determination on Pedestal Actuator Imports from the People's Republic of China* (Presidential Determination), 68 Fed. Reg. 3157 (2003). The President's stated reasons for denying the import relief had nothing to do with foreign affairs or national security, two arenas of Presidential power into which courts historically have been wary of encroaching.

Petitioner agrees that *United States v. Bush*, 310 U.S. 371 (1940), *Dakota Central Telephone Co. v. State of South Dakota*, 250 U.S. 163 (1919) and *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), are distinguishable from the opinion below, because in each of those cases "special reasons existed for concluding that judicial review was precluded." *Chamber of Commerce*, 74 F.3d at 1332 n.5. That distinction illustrates the need to grant certiorari here, because the "special reasons" that deny judicial review of Presidential action are narrow, historically accepted grounds of discretionary decisions about national security and foreign relations, neither being present here.

II.

THE PRESIDENT'S DECISION UNDER SECTION 421 CONTRAVENED THE EXPLICIT LIMITATIONS THEREOF AND IS THEREFORE SUBJECT TO REVIEW BY THE COURTS

The President's determination under Section 421(k)(2) does not constitute an exercise of broad Presidential discretion. If anything, it was an arbitrary act unjustified by law. Under Section 421(k)(2), the President must make specific findings of economic fact pursuant to a limited grant to him by Congress of its constitutional power. Specifically, the President's findings under Section 421(k)(2) must be supported by facts of record and the statute affords him no discretion in regard to the grounds upon which he can make his decision. The mere incantation of the statutory elements in an administrative order does not substitute for a factual record from which an administrative decision can be made, or suffice for a decision within the parameters set by the statute.

Petitioner does not ask this Court to "flyspeck" the President's exercise of discretion. To begin with, the Court of Appeals made no effort to review the merits of the case and this Court must set the standard for judicial review before the merits can be reached. Secondly, the President failed even to create an administrative record against which his findings can be tested.

Courts are obligated to determine the exact nature of the President's powers and the limitations thereon by examining the statutory language and legislative history of the delegating statute, and by comparing the statutory grant with similar statutes previously interpreted by the courts. Here, neither the Court of International Trade nor Federal Circuit performed such basic analysis of the President's function under Section 421.

Respondents' position is that the President may "comply" with Section 421 by merely parroting in conclusory fashion the language of the statute. However, if such Presidential "findings" are not subject to review by the courts, then the limitations prescribed by Congress on delegated Presidential authority are rendered meaningless and the Executive Branch is checked only by justifications of its choosing. In fact, the D.C. Circuit expressed this very concern in *Chamber of Commerce*: "In sum, we think it untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to [the authorizing statute]." 74 F.3d at 1332.

Respondents' argument that *Dalton* establishes a sufficient distinction "between claims of constitutional violations and claims that an official has acted in excess of his statutory authority" *Dalton*, 511 U.S. at 472, such that the propriety of the latter cannot be judicially reviewed on

the record, *see* Opp. 12, makes no sense. Underscoring the point, respondents fail to proffer any explanation of the purported distinction between the reviewability of *ultra vires* and unconstitutional Presidential actions.

Conversely, petitioner submits that the President acted *without* statutory authority precisely *because* he failed to make the required findings of fact on the record required by the statute, substituting mere conclusions for the requisite factual findings. If certain Presidential actions contravene the limitations of an authorizing statute, then the President necessarily performs those acts *without* statutory authority. Such actions are unconstitutional and are subject to judicial review.

Petitioner has never had the opportunity to demonstrate that the President's findings in this case are unsupported despite the statutory requirements to the contrary, because the courts have refused even to examine whether the President's findings are supported by the record. It is disingenuous to assert that, upon a decision by this Court that judicial review exists, respondents cannot prevail. Indeed, Justice Gajarsa stated that the "majority's assertion that Motion Systems fails to state a colorable claim of ultra vires action is dubious." *Motion Systems*, 437 F.3d at 1364 (Gajarsa, J., concurring in part and con rring in the judgment).

The respondents argue that certiorari should not be granted because, in their view, petitioner will not prevail on the merits even if this Court holds that judicial review may be had. That argument likewise lacks merit. Indeed, this case concerns the Presidential finding that economic grounds (a purported increase in price of the downstream product) dictated that America's elderly be provided with non-American mobility scooters priced contrary to law,

because of their quality and low cost, when no part of the administrative record established those propositions. In fact, the factual record directly contradicts this.

For example, Comment No. 29 before the United States Trade Representative (USTR) quotes the sworn testimony of George Flowers, an officer of Electric Mobility Corporation (EMC), in federal court on December 17, 2002 that EMC had "[a]bsolutely not" reduced its prices because of savings on the cheaper Chinese imports. (*See* Comment No. 29 to USTR, via letter dated December 23, 2002, at 2). Yet, the President, citing the "cost of the quota to consumers" and the attendant negative impact upon "the many disabled and elderly purchasers of mobility scooters", denied the requested import relief on the ground that such relief "was not in the national economic interest of the United States." Presidential Determination, 68 Fed. Reg. 3157-58.

Uncontradicted Veterans Affairs pricelists submitted by petitioner to the USTR demonstrated that EMC had *not* lowered its prices on mobility scooters as a result of using the Chinese pedestal actuators. (Complaint, Ex. 2, Attachments 1(a) and 1(b).) (CAFC JA 83-98.) Notwithstanding such evidence, the USTR, in a letter dated March 7, 2003, denied petitioner's request for reconsideration of the President's findings. (Complaint, Ex. 3.) (CAFC JA 154-55.) Further, it is indisputable the FDA has recalled the imported devices due to their shoddy construction and health risks (*see* FDA Recall Number Z-0903-06), defects that were brought to the attention of the USTR, and presumably the President, in Comment No. 29 before the USTR. (*See* Comment No. 29 to USTR, via letter dated December 23, 2002, at 2-3.)

In sum, the challenged Presidential findings are unsupported by and/or contrary to the factual record and thus,

at a minimum, petitioner raises valid claims that the President acted beyond his delegated authority under Section 421(k)(2). Petitioner is therefore entitled to judicial review of its claim of *ultra vires* Presidential action.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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